

STATE OF MICHIGAN
MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of TELNET)	
WORLDWIDE, INC., THE ISERV COMPANY,)	
FISKARS, INC., and ROBERT TATAY)	
Against MICHIGAN BELL TELEPHONE)	Case No. U-13526
COMPANY, d/b/a SBC AMERITECH)	
MICHIGAN and Request for Emergency)	
Relief)	
_____)	

PROPOSAL FOR DECISION

HISTORY OF PROCEEDINGS

On September 5, 2002, TelNet Worldwide, Inc. (TelNet), the Iserv Company (Iserv), Fiskars, Inc. (Fiskars), and Robert Tatay (also collectively referred to as Complainants) filed a complaint against Michigan Bell Telephone Company, d/b/a SBC Ameritech Michigan (Ameritech Michigan). The complaint alleges that Ameritech Michigan violated the Michigan Telecommunications Act (MTA), MCL 484.2102 et seq.; MSA 1469(101) et seq., and the Interconnection Agreement (ICA) between Ameritech Michigan and TelNet.¹ On October 3, 2002, Ameritech Michigan filed an Answer and Affirmative Defenses.

A prehearing conference was held on October 7, 2002, at which time Attorney Gary L. Field appeared on behalf of Complainants. Attorneys Michael G. Vartanian, Joseph P. Tocco, and Jennifer Frye appeared on behalf of Ameritech Michigan.

¹ The complaint states that TelNet adopted the ICA between Ameritech Michigan and Coast to Coast Telecommunication, which had been arbitrated before the Commission and approved in its October 24, 2000 order

Assistant Attorney General Michael A. Nickerson appeared on behalf of the Commission Staff (Staff).

Complainants and Ameritech Michigan subsequently filed motions for summary disposition. A hearing on the motions was held on October 30, 2002. At the conclusion of oral argument, the Administrative Law Judge (ALJ) denied both motions.

Cross-examination was held on December 4 and 5, 2002. At the outset of the hearing, the ALJ granted in part and denied in part the motion to strike filed by Ameritech Michigan. The ALJ struck in its entirety the proposed rebuttal testimony of Paul Labrie. Later in the hearing, the ALJ denied TelNet's motion to strike a discreet portion of Mr. Hamiter's testimony.

Complainants presented the prefiled testimony of Robert Tatay in his individual capacity; John Tolhuizen, Fiskars' Controller; Darryl Rogers, a Systems Engineer for DeWitt Computer Technologies; Todd Gardner, Director of Product Development for Iserv; Mark Iannuzzi, President of TelNet; and Peter Iannuzzi, TelNet's Network Operations Manager. Ameritech Michigan presented the prefiled testimony of James Hamiter, Area Manager of Network Regulatory, Interconnection for SBC Communications Management Services, Inc., as well as the testimony of Linda De Bella, Associate Director of Regulatory Support for SBC Communications.

Complainants, Ameritech Michigan, and the Staff filed briefs on December 16, 2002. Complainants and Ameritech Michigan filed reply briefs on December 23, 2002.

in Case No. U-12382. The Commission approved TelNet's adoption of that ICA in its September 27, 2001 order in Case No. U-13005.

THE COMPLAINT

Count I of the complaint, “Failure to Provide Equal in Quality Interconnection,” alleges that Ameritech has failed to provide interconnection with TelNet to enable TelNet to send and receive interLATA local traffic in violation of Sections 3.6 and 19.16 of the parties’ ICA, Ameritech Michigan’s tariff (Tariff M.P.S.C. No. 20R) and Sections 305(1)(b) and (n), and 502(1)(a) of the MTA. Specifically, Count I involves three calling routes: calls from the Nashville, Michigan exchange to the Hastings, Michigan exchange; calls from the Charlotte, Michigan exchange to the Bellevue, Michigan exchange; and calls from South Bend, Indiana to the Niles, Michigan exchange.

Count II of the complaint, “Refusal to Activate New TelNet NXX Codes,” alleges that Ameritech Michigan has refused to activate, in its tandem switches, certain TelNet NXX codes that were assigned to exchanges located in Verizon’s historical service areas, in violation of Sections 7.3 and 19.15 of the parties’ ICA and Sections 305(1)(b) and (n) of the MTA.

Sections 3.6, 7.3, 19.15, and 19.16 of the ICA provide that:

3.6 Nondiscriminatory Interconnection.

Interconnection shall be equal in quality to that provided by the Parties to themselves or any subsidiary, Affiliate or other person. For purposes of this **Section 3.6**, “**equal in quality**” means the same technical criteria and service standards that a Party uses within its own network.

7.3 Transit Service.

7.3.1 Ameritech shall provide Transit Service as provided in this **Section 7.3**.

7.3.2 "Transit Service" means the delivery over the Local/IntraLATA Trunks of (i) Local Traffic and IntraLATA Toll Traffic that (x) originates on Coast's network and terminates to a third party LEC, ILEC, or CMRS (such as third parties collectively referred to as a "Transit Counter-Party") and (y) originates on the Transit Counter-Party's network and terminates to Coast and (ii) 800 IntraLATA Toll Traffic that originates and terminates between one (1) or more IntraLATA Telecommunications Carriers, including third party LECs, ILECs and CMRs (Collectively, "IntraLATA 800 Traffic"), as more fully described in **Section 7.3.9**.

7.3.3 Coast [TelNet] shall route Transit Traffic via Ameritech's Tandem Switches, and not at or through any Ameritech End Office.

19.15 Switch Programming.

Each party shall program and update its own Central Office Switches and End Office Switches and network systems to recognize and route traffic to and from the other Party's assigned NXX codes.

19.16 Certain Network Facilities.

Each party is individually responsible to provide facilities within its network which are necessary for routing, transporting, measuring, and billing traffic from the other Party's network and for delivering such traffic to the other Party's network using industry standard format and to terminate the traffic it receives in that standard format to the proper address on its network. The Parties are each solely responsible for participation in and compliance with national network plans, including The National Network Security Plan and The Emergency Preparedness Plan.

Section 3.05(1)(b) and (n) of the MTA provide that:

(1) A provider of basic local exchange service shall not do any of the following:

* * *

(b) Refuse or delay interconnection or provide inferior connections to another provider.

* * *

(n) Perform any act that has been prohibited by this act or an order of the commission.

Section 502(1)(a) of the MTA provides that:

(1) A provider of a telecommunication service shall not do any of the following:

(a) Make a statement or representation, including the omission of material information, regarding the rates, terms, or conditions of providing a telecommunication service that is false, misleading, or deceptive.

DISCUSSION AND FINDINGS

The basic facts of this case are, for the most part, undisputed. However, the parties presented numerous legal arguments throughout this proceeding, which are fully set forth in their respective pleadings, briefs, reply briefs, and the evidentiary record. Indeed, much of the testimony essentially constituted legal argument, some of which the ALJ struck.

In the interest of presenting this Proposal for Decision in a timely manner, all of the parties' arguments will not be repeated here in their entirety. Only those arguments and testimony that are necessary for reasoned analysis will be addressed in this Proposal for Decision, although the ALJ has reviewed and taken into consideration the entire record in arriving at her findings, conclusions, and recommendations. Any arguments not specifically addressed or determined were deemed unnecessary to the ALJ's ultimate findings and conclusions.

Count I

Although Ameritech Michigan may not carry calls over LATA boundaries, i.e., interLATA calls, there are a number of areas in which it has received federal waivers to carry such traffic.² In those areas, Ameritech Michigan does not impose toll charges on those calls. Instead, they are tarified as local calls and are referred to as interLATA local calls. Ameritech Michigan's local calling tariff, Tariff M.P.S.C. No. 20R, pursuant to which this traffic is carried was admitted into evidence as Exhibit C-13.

Complainants allege that although Ameritech Michigan allows its own customers to make and receive interLATA local calls to and from another Ameritech Michigan customer, it bills these calls as toll calls when either the originating caller or the terminating caller is a customer of a competitive local exchange carrier (CLEC). As a result, Complainants allege that Ameritech Michigan has failed to provide them with equal in quality interconnection in violation of the ICA and the MTA.

Mr. Tatay testified that he lives in Nashville, Michigan, and that he wished to receive service from ToastNet, an Internet Service Provider (ISP) located in the Hastings exchange. He stated that Ameritech Michigan provides his local telephone service, and that he has always been able to make local calls to the Hastings exchange. However, Mr. Tatay explained that after he began receiving Internet service from Toast Net, which is a customer of TelNet, he began incurring toll charges for his calls to Toast Net in the Hastings exchange.

Specifically, Mr. Tatay's first telephone bill after switching to ToastNet included \$170 in AT&T long distance charges for calling ToastNet's Hastings telephone number.

² Ameritech Michigan admitted at paragraph 16 of its Answer that "it has received federal waivers with respect to the interLATA calls at issue."

After Mr. Tatay received that bill, he canceled his account with ToastNet. Mr. Tatay's next telephone bill included \$125 in long distance charges for his telephone calls to Toast Net in Hastings, which he had incurred before he realized he was being assessed long distance charges and before he canceled his ToastNet ISP service.

Mr. Tatay further testified that, at least twice, Ameritech Michigan customer service representatives told him that the calls at issue were supposed to be local calls. He explained that the second representative with whom he spoke faxed him an internal Ameritech Michigan document showing that calls from Mr. Tatay's telephone number, which has an NPA-NXX of 517-852, to a telephone number with an NPA-NXX of 269-798, are local. (Exhibit C-12.) After he was told that his calls to Hastings had been charged as long distance calls in error and that his account would be credited, Mr. Tatay wanted to see if the underlying problem had been corrected. On October 24, 2002, he placed another telephone call to Hastings with a NPA-NXX of 269-798. When he received his next telephone bill, he discovered that he had been assessed a toll charge for the call.

Mr. Gardner testified that, in a number of exchanges, Iserv has switched from Ameritech Michigan to TelNet for basic local exchange service. Typically, he stated, when Iserv made the switch, it simply ported its telephone numbers from Ameritech Michigan to TelNet, although in other exchanges, Iserv signed up with TelNet initially. Mr. Gardner stated that in situations in which Iserv's Ameritech Michigan telephone number was ported to TelNet, some Iserv customers were no longer able to make interLATA local calls to Iserv using the same number that they had previously called.

Consequently, Mr. Gardner stated, Iserv's customers in the exchanges at issue must now pay a toll charge to reach Iserv for Internet service.

Both Mr. Gardner and Mark Iannuzzi testified regarding problems with the completion of local calls from Charlotte to Bellevue. Mr. Iannuzzi stated that Ameritech Michigan has refused to terminate interLATA local calls made by customers in the Charlotte exchange to TelNet customers in the Bellevue exchange. Mr. Gardner testified that just like the Hastings-Nashville situation, Ameritech Michigan has programmed its switches to route calls to the designated long distance provider who, in turn, charges long distance charges for the calls. Mr. Gardner stated that one customer incurred over \$2,000 in toll charges, which Ameritech Michigan refused to refund. Mr. Gardner stated that Iserv was able to devise a "bandaid" solution by obtaining a telephone number for the Charlotte exchange, so that Iserv's Charlotte customers could call Iserv's Charlotte telephone number, and Iserv's Bellevue customers could call Iserv's Bellevue number.

Fiskars is a construction company that is a general contractor located in St. Joseph, Michigan. Mr. Tolhuizen explained that Fiskars shares common ownership and control with Genesis Architects and Engineers, Inc. (Genesis Architects) whose office is located in South Bend, Indiana. Mr. Tolhuizen testified that Iserv's South Bend office, i.e., Genesis Architects, frequently makes calls to Niles, Michigan, including ISDN data calls to connect to Iserv, its ISP. For years, Mr. Tolhuizen explained, these calls were local and Fiskars was not charged long distance rates. However, he stated that in May 2002, after Iserv's Niles office switched from Ameritech Michigan to TelNet for local

service, Fiskars' Niles office could no longer receive interLATA local calls from the South Bend exchange.

Over the next several days and weeks, Darryl Rogers, Fiskars' primary network consultant, spent numerous hours trying to determine the source of the problem. He testified that the South Bend office was unable to make either local or long distance calls to Iserv's Niles telephone number, which is serviced by TelNet. At one point, Mr. Rogers contacted Iserv to see if Iserv was experiencing equipment problems. He learned that Ameritech Michigan was porting Iserv's telephone number, and he later determined that Iserv had switched its local service from Ameritech Michigan to TelNet. At this point, TelNet engineers became involved.

Peter Iannuzzi, a TelNet engineer, testified that when he became aware of the problem with traffic along this route, he initiated a trouble ticket with Ameritech Michigan. However, while investigating the problem, Bethany, an Ameritech Michigan service representative, questioned whether Ameritech Michigan was obligated to accept local traffic from South Bend.

Complainants presented internal Ameritech Michigan e-mails, which reveal discussions between several Ameritech Michigan personnel about the problem. Exhibit C-31 is a June 10, 2002 e-mail from Gary Clark, an Ameritech Michigan employee, to several other Ameritech Michigan employees inquiring what to do. Mr. Clark posed three options for handling TelNet's codes:

(1) leave it blocked (which Telnet won't like since it was open for 10 months).

(2) put it back the way it was prior to the trouble reported by TelNet, would make the call go interlata (which is not good either).

(3) The other possibility would be to see if I can have it opened in the Niles office, so Niles tandems it to Telnet (policy violation).

Exhibit C-14 is another internal Ameritech Michigan e-mail. It shows that on July 1, 2002, Sherrie Martin, an Ameritech Illinois employee, sent Gary Clark an e-mail inquiring into the status of the Niles-South Bend issue. Mr. Clark responded that, "you are sending the calls to Niles, however, I have found that Niles is blocking the call anyway."

Thereafter, on August 14, 2002, Mr. Rogers discovered that Ameritech Michigan selected the third option for completing voice traffic, i.e., voice calls from South Bend to the Niles TelNet numbers had begun to work and the calls were being completed as local. However, Mr. Gardner testified that Ameritech Michigan is still not completing data calls originated in South Bend to Iserv's TelNet telephone number.

Complainants take the position that the Commission has already decided the issue presented in Count I. They rely on the Commission's April 12, 1999 order in Case No. U-11821, In re Complaint of Glenda Bierman against CenturyTel of Michigan, Inc., which was affirmed by the Michigan Court of Appeals [245 Mich App 351 (2001).] In Bierman, a customer of an Incumbent Local Exchange Carrier (ILEC) called an ISP with a local telephone number associated with the adjacent exchange. The ISP took basic local exchange service from a CLEC. The ISP was not physically located in the adjacent exchange but, rather, was physically located in Flint, 100 miles from the exchange to which the ISP's telephone number was associated. The exchange to which the CLEC/ISP number was associated was designated in the ILEC's tariff as being within the local calling area. The ILEC refused to complete the calls as local calls,

resulting in the customer incurring thousands of dollars in toll charges. The Commission rejected the ILEC's argument that it was not obligated to complete the calls as local calls. The Commission held that the ILEC must abide by its own tariffed designation of local calling when its customers call a customer of a CLEC.

On behalf of Ameritech Michigan, Mr. Hamiter testified that an extended area service (EAS) calling arrangement exists between the Hastings and Nashville exchanges. He acknowledged that a federal waiver was granted with respect to both the Nashville-Hastings exchanges and the Charlotte-Bellevue exchanges. Despite that waiver, Mr. Hamiter explained that Ameritech Michigan does not treat a call from an Ameritech Michigan customer in Nashville to a TelNet customer with an NPA-NXX code in Hastings as a local call, because the TelNet number is in TelNet's Grand Rapids switch. According to Mr. Hamiter, the waiver relative to the Nashville and Hastings exchanges and the Charlotte and Bellevue exchanges does not apply to a call from Nashville to the TelNet number in Grand Rapids. In other words, only calls from an Ameritech Michigan customer in the Hastings exchange to another Ameritech Michigan customer in the Nashville exchange are treated as local calls.

Ameritech Michigan contends that the problem with TelNet's position is that the requested routing, which the ICA does not cover, would require the traffic to be routed across the LATA boundary, over toll switched access trunks, through an SBC tandem switch, and then on to a TelNet switch in Grand Rapids, which is not within the "community of interest" permitted by Judge Greene's waivers. In Ameritech Michigan's view, the waivers are limited, by route and scope, to what was requested by the original Bell Operating Company (BOC) and granted by Judge Greene. Ameritech Michigan

submits that unless TelNet agrees to install meet-point trunks and facilities to carry the traffic on its network, Ameritech Michigan either must continue to hand over the traffic to an IXC at its point of presence within the originating LATA or deliver the calls to TelNet's switch in the Lansing LATA in order for the calls to be completed. In short, Ameritech Michigan asserts that it cannot send traffic to TelNet on the terms it has demanded, because it would cause Ameritech Michigan to violate the "in-region" InterLATA ban first imposed in the Modified Final Judgment (MFJ) and now in Section 271 of the Federal Telecommunications Act of 1996 (Federal Act).

Ameritech Michigan further maintains that its local calling tariff is also subject to federal law and, consequently, the tariff does not support Complainants' allegations in Count I. According to Ameritech Michigan, under its tariff, TelNet's ability to obtain interconnection is dependent on whether that interconnection is permitted and required by the Federal Act and the rules and regulations of the Federal Communications Commission (FCC). In any event, Ameritech Michigan submits that its tariff directly refutes Complainants' claim. Ameritech Michigan states that its tariff provides that "Interexchange services and facilities are provided by the Company only within the LATA and affiliated exchanges (i.e., intraLATA) in which the customer is located."

As to the calls from South Bend, Indiana to Niles, Michigan, Ameritech Michigan submits that it is undisputed that it is neither the originating carrier nor the terminating carrier on these calls, and the calls do not involve or concern its customers. Rather, Ameritech Michigan states, an Indiana Bell customer (Genesis Architects) in South Bend placed these calls to a TelNet customer (Iserv) in Grand Rapids. Ameritech

Michigan therefore asserts that it has no responsibility for determining whether the calls are completed as local or toll calls.

Ameritech Michigan further asserts that all of Complainants' claims relative to calls from South Bend to Niles must be dismissed because the Commission does not have jurisdiction over these calls. According to Ameritech Michigan, these calls are indisputably interstate calls and, as such, they are within the exclusive jurisdiction of the FCC. Additionally, Ameritech Michigan submits that the parties' ICA does not apply to interstate calls placed by an Indiana Bell customer to a TelNet customer. Ameritech Michigan asserts that if TelNet has problems with the calls it receives from Indiana Bell customers in South Bend, its remedy is to negotiate an interconnection agreement with Indiana Bell, which would cover the terms and conditions between those entities.

The ALJ finds that all of Ameritech Michigan's arguments must be rejected. With respect to the Nashville-Hastings and Charlotte-Bellevue calling routes, the Commission's April 12, 1999 order in Bierman, Case No. U-11821, is directly on point. In that case, the Commission held, at page 6:

The Commission concludes that the complaint must be resolved by reference to the tariff under which CenturyTel provides basic local exchange service to its customers. That tariff defines the local calling area for the Newport Exchange as including the Monroe Exchange. CenturyTel argues, notwithstanding the language of the tariff and a long tradition of local calling to the Monroe Exchange, that calls to only certain customers of certain providers with certain NXXs are local calls and that the customer must determine for herself, at the risk of receiving an unexpected bill for thousands of dollars, whether a particular call will be treated as local or toll. The plain language of the tariff does not support CenturyTel's position.

Similarly, this case must be resolved by reference to the tariff under which Ameritech Michigan provides interLATA local calling. Tariff M.P.S.C. No. 20R (Exhibit C-13.) clearly states that the following calls are local:

Bellevue to Charlotte (1st Revised Sheet No. 2)
Charlotte to Bellevue (1st Revised Sheet No. 4)
Hastings to Nashville (1st Revised Sheet No. 10)
Nashville to Hastings (1st Revised Sheet No. 15)
Niles to South Bend, Indiana (1st Revised Sheet No. 16)

Ameritech Michigan insists that this case is distinguishable from Bierman because it did not involve a BOC being asked to transport interLATA traffic outside an EAS “community of interest” and beyond the scope of a federally granted waiver. However, Exhibit C-13, Ameritech Michigan’s tariff, does not say anything about LATA boundaries, and it does not indicate that it is limited to calls made only between Ameritech Michigan’s own customers. Like Bierman, nothing in the tariff states that a customer’s right to place a local call to an adjacent exchange will be lost if he or she tries to call someone who takes service from a competitor of Ameritech Michigan.

Not only does Ameritech Michigan’s tariff provide that the calls at issue are local, the company also publishes local calling information on its web page. Exhibits C-3 and C-12 indicate that calls from Nashville to Hastings and from Charlotte to Bellevue are local. By routing these calls to long distance providers and causing customers to incur toll charges, Ameritech Michigan is acting contrary to both its filed tariff and the information it publishes to the world on the Internet, thereby misleading the public. Consequently, like Bierman, callers must determine for themselves, at the risk of receiving an unexpected bill for hundreds, if not thousands, of dollars, whether a particular call will be treated as local or toll.

The following exchange between the ALJ and Mr. Hamiter highlights the misleading nature of Ameritech Michigan's actions, which results in the traffic at issue being designated as toll calls.

JUDGE STUMP: So are you saying that even though the tariff says that a call from Nashville to Hastings is local, that somehow that call is routed in such a way that it ends up being a toll call?

THE WITNESS: Could I go to the board - -

JUDGE STUMP: No.

THE WITNESS: - - and explain that to you, Judge?

JUDGE STUMP: Well, I thought you testified that a call from Nashville to Hastings is a local call?

THE WITNESS: It is. As - - as - - and we have facilities and trunks set up that cross the LATA boundary and deliver calls from Ameritech Michigan end-offices in the Nashville exchange over to the Hastings exchange, and - - and those trunk groups are solely for the delivery of calls between two end-offices.

* * *

JUDGE STUMP: But how does it become a toll call, then, if the tariff indicates it's a local call? . . How is a customer supposed to know that all of a sudden they're going to get a toll charge?

* * *

THE WITNESS: The problem with - - is how the call must be delivered in order for the call to be completed. In order for the call to be completed, it must be sent to the switch in which the code resides. The only trunk group that we have that crosses that particular LATA boundary, Your Honor, is the trunk group that is designed to carry traffic from our end-office on the Nashville side of the boundary to our end-office on the Hastings side of the boundary, and - - and vice versa as well. Whenever the - - a customer in Nashville - - one of our customers in Nashville, dials the particular

numbers that Mr. Field is - - is talking about, which are numbers that reside in the TelNet Grand Rapids switch, our translations identify that as a code that lives, if you will, in the Grand Rapids LATA. And our switches are programmed such that whenever a code like that comes up, it will hand that call off to an interexchange carrier, and particularly the interexchange carrier which that customer in Nashville is PIC'd to. (3 Tr. 365-367, emphasis added.)

Despite the ALJ's question, and repeated questioning by counsel for Complainants, Mr. Hamiter was never able to explain how customers are suppose to know that they cannot rely on the tariff. The simple and obvious answer to that question is that there is no way for customers to know.

Mr. Hamiter tried to justify the discrepancy between Ameritech Michigan's tariff and the actual billing by referring to a notation on the company's web page, which states that, ". . . this local calling area information is subject to change without notice. Ameritech makes no representation as to the ongoing accuracy of this information." (Exhibit C-12.) Mr. Hamiter acknowledged, however, that this information does not advise customers that if the call is ported the local calling information would not be correct. (3 Tr. 374.) The ALJ finds that Ameritech Michigan is, in fact, responsible for the accuracy of the information it publishes and upon which customers must rely. Ameritech Michigan should not be permitted to use such a disclaimer to avoid its obligation to provide interLATA local calling under the plain language of its tariff.

Mr. Hamiter's prefiled testimony also created the impression that it was not technically feasible for Ameritech Michigan to deliver its customers' calls to TelNet's customers on a local basis. On cross-examination, Mr. Hamiter acknowledged that it is technically feasible and that Ameritech Michigan is, in fact, currently delivering voice traffic on a local basis from South Bend to TelNet customers in Niles. He also stated

that all an Ameritech Michigan technician has to do is input TelNet's code into Ameritech Michigan's equipment. This allows the code to pass across the direct final trunk group to Niles where a SS7 look up is performed. (3 Tr. 401-402.) He also stated that the delivery of local voice traffic to Niles was merely a temporary solution to a customer complaint, but that it is "a direct violation of our policy not to do this." (3 Tr. 402.) Thus, it is clear that there are no technical limitations on Ameritech Michigan's ability to carry this traffic on a local basis, especially in light of the fact that it had been doing so for many years. Rather, it is apparent that Ameritech Michigan has simply changed its "policy."

Similarly, there are no legal impediments to Ameritech Michigan's ability to carry this traffic on a local basis. Ameritech Michigan's reliance on Judge Greene's Divestiture Order in support of its restrictive view that its waiver applies only to its own traffic must be rejected. That Order expressly permitted the BOCs to continue to provide interLATA calling between communities of interest if they received permission. [United States v Western Electric Co., 569 F Supp 990 (1983).] Ameritech Michigan's arguments regarding the scope of its waiver, relying in part on a footnote in Judge Greene's order, is disingenuous when applied to its local calling tariff. Under Ameritech Michigan's rationale, one would have to believe that, after a long tradition of local calling between the exchanges at issue, Ameritech Michigan has suddenly determined that its tariff now actually violates Federal law. The ALJ rejects Ameritech Michigan's strained attempts to limit the scope of its waivers and, in turn, its obligations under its tariff.

The ALJ also agrees with the Staff that Ameritech Michigan's argument, advanced some 20 years after the waiver was granted, has an anti-competitive effect

completely at odds with the intent of the Divestiture Order. Ameritech Michigan's recent decision to reconsider carrying this interLATA traffic as local does not foster competition. The ALJ therefore supports the Staff's recommendation that the Commission should specifically find that the waiver extends to the traffic generically and not just to traffic carried by Ameritech Michigan.

Turning to the calls between South Bend, Indiana and Niles, Michigan, the ALJ finds that the Commission does not have jurisdiction regarding how Ameritech Indiana calls originating in Indiana are to be treated for purposes of interLATA local calling. However, the ALJ agrees with the Staff that the evidence establishes that Ameritech Michigan has traditionally treated calls from South Bend to Niles as a community of interest and has routed and billed them accordingly. As a result, TelNet had a right to rely on this historical treatment when it entered into the ICA with Ameritech Michigan. Ameritech Michigan should have accomplished its change in policy by either a negotiated amendment to the ICA or, after expiration of the ICA, included it in a new agreement, rather than unilaterally refusing to continue to carry the traffic as local.

The ALJ concludes that Ameritech Michigan's refusal to terminate interLATA local calls to TelNet customers violates its tariff as well as Sections 3.6 and 19.16 of the ICA and Section 305(1)(b) of the MTA. Specifically, Ameritech Michigan's actions constitute a refusal to provide equal in quality interconnection between Ameritech Michigan and TelNet, as well as a failure to provide the facilities necessary for routing the calls on a local basis. TelNet should not have to build additional facilities to have this traffic delivered to it. Further, by refusing to treat interLATA local calls between Ameritech Michigan and TelNet customers the same as interLATA calls from one

Ameritech Michigan customer to another Ameritech Michigan customer, Ameritech Michigan is providing inferior connections to TelNet.

Ameritech Michigan has also violated Section 305(1)(n), which provides that a basic local exchange service provider shall not “perform any act that has been prohibited by this act or an order of the Commission.” Ameritech Michigan violated this section when it violated Section 305(1)(b) as well as when it violated the Commission’s order in Bierman. The ALJ rejects Ameritech Michigan’s assertion that it cannot be found in violation of that order because it was not a party to the case. The Commission held in Bierman that an ILEC must abide by its own tariffed designation when its customers call customers of a CLEC. It is that finding that Ameritech Michigan has violated by failing to abide by its own tariffed designation when its customers call customers of TelNet.

Ameritech Michigan also violated Section 502(1)(a) of the MTA by stating in its tariff and on its web page that calls between the exchanges at issue are local, but then refusing to treat them as such. In doing so, Ameritech Michigan has made a statement or representation regarding the terms and conditions of its telephone service that is false, misleading, and deceptive.

Count II

TelNet is the only Complainant to seek relief under Count II of the complaint. TelNet explains that it has procured NXX codes in several LATAs that are associated with both Ameritech Michigan and Verizon historical territories. Exhibit C-16 shows that from mid-1999 to mid-2002, a three-year period of time, Ameritech Michigan routinely

activated TelNet's NXX codes associated with Verizon exchanges. Ameritech Michigan activated 54 such codes over that three-year period.

Since May of 2002, Ameritech Michigan has refused to activate 16 of TelNet's NXX codes. Ameritech Michigan informed TelNet that the ICA did not pertain to "out of exchange" traffic and asked TelNet to execute a Traffic Termination Agreement (TTA) to establish the rates, terms, and conditions for the exchange of traffic to and from the new NXX codes. TelNet refused to do so, because it claims that the ICA does, in fact, apply to "out of exchange" traffic. TelNet relies on Sections 7.3 and 19.15 of the ICA. Section 7.3 relates to "Transit Service"³ and Section 19.15 requires both parties to update their switches and network systems to "recognize and route traffic to and from the other Party's assigned NXX codes."

Ameritech Michigan, on the other hand, contends that the traffic routing contemplated by the ICA concerns only traffic that originates and terminates in Ameritech Michigan's service area, i.e., where Ameritech Michigan is the ILEC. Ms. De Bella testified that Ameritech Michigan has agreements for traffic that it is required to provide as an ILEC and separate agreement for traffic when Ameritech Michigan is not the ILEC. According to Ms. De Bella, if either the originating part of the call or the terminating part of the call is associated with a location that is not in Ameritech Michigan's traditional service territory, that traffic is "out-of-region" traffic. Although Ms. DeBella acknowledged that Section 19.15 of the ICA states that each party is obligated to activate the other party's NXX codes, she stated that the ICA does not apply to the relationship between TelNet and Ameritech Michigan when Ameritech

Michigan is not the ILEC and the traffic originates or terminates outside of Ameritech Michigan's service territory.

The ALJ finds that Ameritech Michigan's argument that the parties' ICA applies only to traffic that originates and terminates in its historic service areas must be rejected. The ALJ agrees with Complainants that the ICA is not limited to traffic that originates and terminates in Ameritech Michigan's service areas. Indeed, the record demonstrates that Ameritech Michigan had previously activated NXX codes in its switches that are assigned to Verizon exchanges. Thus, like its arguments relative to Count I of the complaint, Ameritech Michigan's position that TelNet must now sign a separate TTA to cover this traffic appears to be based on a change in corporate policy rather than on a proper interpretation of the ICA and the law.

Furthermore, Ameritech Michigan's assertion that the NXXs at issue are "resident in Verizon's rate centers," and, therefore, "out of region" is, as pointed out by Mark Iannuzzi, deceptive. Mr. Iannuzzi explained that:

Ms. DeBella is trying to create the impression that the NXXs are physically located out of Ameritech's service territory. However, the term "NXX" is just a shorthand way of referring to a block of phone numbers. If callers are to be able to call these phone numbers, obviously everyone's switches have to be programmed to recognize the numbers and to route the calls. The switches that Ameritech is refusing to program are physically located in Ameritech service territory. The switches at issue are not Verizon switches, they are Ameritech switches. (3 Tr. 248-249, emphasis added.)

Thus, it is clear that TelNet has not requested that Ameritech Michigan take any action outside of its service territory. Rather, TelNet simply requests that Ameritech

³ In its November 26, 1996 order in Cases Nos. U-11151 and U-11152, the Commission stated that, "Transiting refers to the delivery of traffic between AT&T and a third-party local exchange carrier (LEC) by Ameritech Michigan through use of Ameritech Michigan's switches and local intraLATA trunks." (pp. 10-11.)

Michigan activate TelNet's NXX codes in switches that are owned and controlled by Ameritech Michigan and that are located in Ameritech Michigan's exchanges. The ALJ therefore finds that Ameritech Michigan's position that TelNet must sign a separate TTA to cover this traffic is another attempt to avoid its obligations under the ICA.

Although Complainants also relied on the ICA's transiting requirement in support of Count II, neither they nor Ameritech Michigan explained the connection, if any, between transit service and NXX codes. In other words, the ALJ is unable to determine from this record what transit service has to do with the activation of NXX codes. She is also unable to determine from this record if the service at issue in Count II does, in fact, constitute transit service. In any event, the record does establish that Ameritech Michigan was previously activating NXX codes. Consequently, Ameritech Michigan should have renegotiated this issue with TelNet rather than unilaterally refusing to continue to activate NXX codes unless TelNet executed a separate TTA. Therefore, the ALJ finds that it is unnecessary to reach the issue of transit service in resolving Count II.

The ALJ concludes that, by refusing to activate TelNet's NXX codes, Ameritech Michigan has violated Section 19.15 of the ICA. In doing so, Ameritech Michigan has also violated Section 305(1)(b) of the MTA by refusing and delaying interconnection with TelNet. Ameritech Michigan also violated Section 305(1)(n) of the MTA when it violated Section 305(1)(b).

Standing

With respect to Count I of the complaint, Ameritech Michigan argues that Mr. Tatay cannot make any claims under: (1) the ICA, because he is not a party to that agreement; (2) Section 305(1)(n) of the MTA, which is premised on the Commission's

finding that Ameritech Michigan violated the ICA; or (3) Section 305(1)(b), which involves interconnections between providers and does not contemplate a claim by an end-user customer. Consequently, Ameritech Michigan submits, Mr. Tatay is limited to a claim that Ameritech Michigan violated its tariff and, therefore, according to the complaint, Section 502(1)(a) of the MTA.

Ameritech Michigan further contends that TelNet's claims are similarly limited. In Ameritech Michigan's view, while TelNet may claim that Ameritech Michigan violated the ICA, it does not have standing to claim that Ameritech Michigan violated its tariff or Section 502(1)(a) because TelNet is not an end-user on the calls. Ameritech Michigan therefore concludes that TelNet's claims are limited to a claim that Ameritech Michigan violated the ICA, and Sections 305(1)(b) and (n) in connection with the Nashville to Hastings calls.

The ALJ finds that all of Ameritech Michigan's arguments must be rejected. Contrary to Ameritech Michigan's arguments, all four Complainants have standing under Count I, because they have pleaded proper claims for relief under the MTA. Furthermore, Mr. Tatay, Fiskars, and Iserv are not claiming to be third party beneficiaries of the ICA. Rather, their claims are based on Ameritech Michigan's violations of the MTA.

Furthermore, Section 601 of the MTA provides that if the Commission finds that a person has violated the MTA, the Commission shall order remedies to protect and make whole ratepayers and other persons who have suffered an economic loss as a result of the violation. Section 102(v) defines person as "an individual, corporation, partnership, association, governmental entity, or any other legal entity." All of the Complainants

clearly fall within this definition. Mr. Tatay is a ratepayer of Ameritech Michigan, and Fiskars and Iserv are also ratepayers in the general sense in that they are telecommunications customers who suffered damages as a result of Ameritech Michigan's violations of the MTA. TelNet is a corporation and a telecommunications provider that has also suffered damages as a result of those violations.

SANCTIONS

Section 601 of the MTA provides, in pertinent part, that:

If after notice and hearing the commission finds a person has violated this act, the commission shall order remedies and penalties to protect and make whole ratepayers and other persons who have suffered an economic loss as a result of the violation, including, but not limited to, 1 or more of the following:

(a) Except as provided in subdivision (b), the person to pay a fine for the first offense of not less than \$1,000.00 nor more than \$20,000.00 per day that the person is in violation of this act, and for each subsequent offense, a fine of not less than \$2,000.00 nor more than \$40,000.00 per day.

* * *

(e) Cease and desist orders.

(f) Except for an arbitration case under section 252 of Part II of title II of the communications act of 1934, chapter 622, 110 Stat.66, attorney fees and actual costs of a person or a provider of less than 250,000 end-users.

The Commission has previously held that when a complainant establishes that a respondent has violated the MTA or a Commission rule, the complainant is entitled to recover "reasonable compensation for his time in dealing with the situation." (Case No. U-13079, November 8, 2000.) In this case, Complainants have incurred substantial

expenses in trying to resolve and, ultimately, litigate this case. As requested by the ALJ at the conclusion of the hearing, Complainants attached to their brief a detailed summary of their losses. Attachment B, entitled "Summary of Damages," includes the amount of time Complainants spent dealing with this case along with hourly rates as well as supporting transcript citations.

The ALJ finds that, for the most part, Complainants' summary is supported by the record and should be adopted. However, there are two items related to Fiskars that lack sufficient underlying support and, consequently, are speculative. Those items are \$1,500, "Opportunity cost of having graduate architect devote 30 hours to problem," and \$1,000, "Cost of decreased productivity caused by Ameritech's intermittent completion of local calls." As a result, the ALJ has deducted \$2,500 from the calculation of Fiskar's economic damages.

The ALJ therefore recommends that the Commission order Ameritech Michigan to pay Robert Tatay \$476 for his lost time plus \$32.40 in mileage for attendance at the hearing (90 miles x \$.36 per mile⁴) for a total of \$508.40.

The Commission should order Ameritech Michigan to pay Fiskars \$34,933.74 plus \$90 in mileage for attendance at the hearing (250 miles x \$.36 per mile) for a total of \$35,023.74.

The Commission should order Ameritech Michigan to pay Iserv \$31,755.56 plus \$230.40 in mileage (640 miles for 5 trips to Commission x \$.36 per mile) for a total of \$31,985.96.

⁴ The Civil Service/Management and Budget approved private vehicle use rate is \$.36 per mile effective January 1, 2003.

The Commission should order Ameritech Michigan to pay TelNet \$30,000.⁵ Based on the foregoing amounts, the Commission should order Ameritech Michigan to pay Complainants a total amount of \$97,518.10 in economic damages.

As demonstrated in this Proposal for Decision, Ameritech Michigan has committed numerous violations. Given Ameritech Michigan's illegal and blatantly anti-competitive actions, which have caused the Complainants significant damage, the ALJ finds that a substantial fine should be assessed in this case. Notwithstanding this finding, Complainants' proposed fines are not only unreasonable and excessive, they are simply unrealistic. Using Complainants' formula, which uses a daily amount for each violation and each Complainant, the fines could run into the tens, if not hundreds, of millions of dollars. The ALJ finds that it is more realistic and workable to calculate the fines based on Ameritech Michigan's overall violations of Sections 305(1)(b) and 502(1)(a) of the MTA.⁶

The ALJ notes that Ameritech Michigan previously has been found in violation of the MTA. As a result, the violations found in this case constitute subsequent offenses and should be calculated at the higher level, i.e., not less than \$2,000 or more than \$40,000 per day. Ameritech Michigan is simply wrong when it argues that Section 601 permits a larger fine only where the Commission finds that a provider has committed the same offense as previously found. Nothing in Section 601 supports such an interpretation. Rather, Section 601 merely refers to "subsequent offense" and does not

⁵ TelNet indicated that it had spent between 120 hours and 180 hours on the South Bend/Niles issue and between 80 and 120 hours on the Bellevue/Charlotte issue. The ALJ used the mid-point of these numbers to arrive at a total of 250 hours x \$120 per hour = \$30,000.

⁶ The ALJ is not recommending a separate fine for the violations of Section 305(1)(n), because to do so would be redundant and excessive given her recommendation of a substantial fine for Ameritech Michigan's violation of Section 305(1)(b).

state that it must be the “same offense.” The ALJ therefore concludes that the fines should be calculated at the rate of \$2,000 per day.

As to Count I, the record indicates that Ameritech Michigan ceased routing interLATA local calls to TelNet on May 29, 2002 (Exhibit C-31.) Using that date as a starting point and ending with the date of issuance of this Proposal for Decision, January 14, 2003, Ameritech Michigan has been in violation of the MTA for 230 days. As a result, the fine is calculated using $230 \text{ days} \times \$2,000 \text{ per day} = \$460,000$. Thus, the total fine for Ameritech Michigan’s violation of Sections 305(1)(b) and 502(1)(a) under Count I is \$920,000.

As to Count II, the record indicates that Ameritech Michigan has refused to activate TelNet’s NXX codes since May 24, 2002. (Exhibits C-32 and C-33.) Using that date as a starting point and ending with January 14, 2003, Ameritech Michigan has been in violation of the MTA for 235 days. As a result, the fine is calculated using $235 \text{ days} \times \$2,000 \text{ per day} = \$470,000$. Thus, the total fine for Ameritech Michigan’s violation of Section 305(1)(b) is \$470,000.

The ALJ therefore recommends that the Commission order Ameritech Michigan to pay a total fine of \$1,390,000 to the State of Michigan. The ALJ also recommends that the Commission order Ameritech Michigan to cease and desist from future violations of its tariff, the MTA, and the Commission’s orders. Finally, the ALJ recommends that the Commission order Ameritech Michigan to pay Complainants their reasonable attorney fees and costs incurred in having to bring this action.

CONCLUSION

The ALJ recommends that the Commission issue an order adopting her findings and conclusions.

MICHIGAN PUBLIC SERVICE COMMISSION

Barbara A. Stump
Administrative Law Judge

January 13, 2003
Lansing, Michigan
dp

ISSUED AND SERVED: January 14, 2003